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IN THE

Supreme Court of the United States

OCTOBER TERM — 1959

No. 340

J. VIRGIL SCOTT, ET AL AND PAUL J. ROGERS, ET AL,
Appellants,

v.

UNION PRODUCING COMPANY, ET AL,
Appellees.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, Claire H. Parmelee and husband, Clyde D. Parmelee, J. J. Burdin, Horace Etchison, G. Sueyasu and wife, Asao Sueyasu, in reply to the Petition for Writ of Certiorari filed herein, respectfully insist that this cause has been, in all things, correctly determined by the Courts below, and herewith submit this Reply.

QUESTIONS PRESENTED

1. Whether the Court of Appeals committed reversible error in its application of the local law of Texas, holding that the terminal provision of a term mineral deed was not modified by shut-in gas well rental pro-

vision of a subsequent oil and gas lease executed by the reversioners to a third-party lessee.

2. When application for writ of error has been made to the Supreme Court of Texas requesting review of a case involving a similar question, and if the Supreme Court of Texas should grant such application, and if in reviewing such case should decide to overrule prior final decisions declaring the applicable law, should the judgment of the Court of Appeals in this case be vacated and this cause remanded to await the outcome of such contingencies?

STATEMENT

Petitioners claim title to fractional interests under two term mineral deeds executed in 1935. These deeds contain identical terminal provisions, as follows:

> "It is further agreed and herein stipulated that in case there is no *paying production* on said land on or before April 25, 1955, and for six months thereafter, this grant shall become null and void and the minerals hereby conveyed shall revert to the said Grantor, her heirs and assigns, but should there be such production, then, and in that event this grant shall remain in full force and effect until such production ceases, after which this instrument shall become null and void."
> (Emphasis added). (R. pp. 26, 29).

These limited term grants contained no substitute production clauses which would allow said grants to be kept alive beyond the reversion date by shut-in well payments in lieu of paying production. Only paying production on and after said date would prolong the grants. (R. 26-31, Exhibits 1 and 2).

In 1954 Respondents executed an oil and gas lease on the property in question in favor of Union Producing Company, plaintiff herein (Supp. R. 1.). Petitioners are in error in referring to this lease as having been executed in 1949. The lease contains a shut-in gas well clause providing, in effect, that while gas from a gas well is not being marketed, lessee may, at its option, pay lessor stated sums of money quarterly, and upon such payment "it will be considered that gas is being produced from said land". (Supp. R. 10). Gas was discovered prior to October 25, 1955, the terminal date of the mineral deeds of 1935, but no gas was produced from such properties in paying quantities until April, 1956. In January, 1956, lessee paid Petitioners, and tendered Respondents, the quarterly shut-in gas well rental provided for in the lease, which tender was refused by Respondents. (R. 144, 149). Petitioners' claim of title under the 1935 term mineral deeds resulted in this suit.

The District Court granted Respondents' motion for summary judgment, holding that there was no paying production on the land on the terminal date of the deeds (R. p. 220) and that the oil and gas lease of 1954, in favor of Union Producing Company, lessee, did not modify the term limitation of the mineral deeds of 1935 (R. p. 226). This ruling was determinative of the case, and other affirmative defenses asserted to Petitioners' claim of title were not ruled upon.

The Court of Appeals, referring "with agreement and approval of the District Judge's analysis of the law and the facts" and adopting "his thorough going opinion", affirmed the judgment.

DISCUSSION

In substance, Petitioners assert:

(1) The decision of the Court of Appeals is in conflict with the holding of the Supreme Court of Texas in the cases of *Spradley v. Finley*, 302 SW 2d, 409, and *Southland Royalty Company v. Humble Oil & Refining Company*, 249 SW 2d, 914.

(2) That application is now pending in the Supreme Court of Texas for writ of error, requesting review of the case of *Archer County, et al. v. Webb, et al.*, 326 SW 2d, 250 (Southwestern advance sheet of September 1st., 1959), and that if such application is granted, the Supreme Court of Texas may change the law of Texas as declared by the Court of Civil Appeals at El Paso, Texas in the Archer County case, and as announced by the Court of Civil Appeals at San Antonio, Texas in the cases of *Sellers v. Breidenbach*, 300 SW 2d, 178 (1957), and *Holchak v. Clark*, 284 SW 2d, 399 (1955).

ALLEGED CONFLICT WITH POOLING CASES

Petitioners assert that the decision of the Court of Appeals is in conflict with the decision of the Supreme Court of Texas in the Spradley and Southland cases. These two pooling cases deal with actual physical paying production. The rationale of these decisions is based upon mutual agreement between the parties to the mineral deed, term mineral owners and reversioners, expressed in the pooling clauses of subsequent oil and gas leases. Petitioners admit that the circumstances in the pooling cases differ from those here involved, but they confuse the effect of actual paying

production from the pooled unit in the pooling cases, with the effect of the optional rental payment of the shut-in gas well clause in this case. Petitioners contend that by Respondents' execution of this lease to a third party with such a clause whereunder Lessee might prolong its lease beyond the expiration of the primary term in 1959, these reversioners thereby, without more, and without any consideration being paid them for so doing, incorporated such shut-in well clause into the limited term grants executed by their predecessor in title, Emma B. Hammond, back in 1935, so as to permit Petitioners' term grants to be extended beyond the reversion date of October 25, 1955, for such time as shut-in well payments were made pursuant to said clause. (Petition 3). This substitute production clause of said lease shows on its face that it was designed solely for the purpose of allowing the lease to be kept alive by and for the Lessee after the end of the paid-up primary term in 1959. Prior to that date, substitute production could not be material or operative. There is not a word or a phrase indicating any intent to write this clause into the prior limited term grants of 1935, and to make it operative on October 25, 1955. In the pooling cases, all owners of mineral interests in certain lands executed leases whereby they agreed to pooling, which meant, under the law of Texas, that they agreed that production from any part of the pool should constitute production from each parcel of land committed to the pool. Each owner thus got the right to share proportionately in the production from the entire pool, in return for giving up the right to share exclusively in production from his own parcel. In both of these cases, there was actual paying production on the reversion date, and the ques-

tion was whether such production on one part of the pool operated to keep alive a term mineral grant on other land in the pool, which would otherwise have lapsed for want of production thereon. The court held that by agreeing to pooling and the legal incidents thereof, all the parties had agreed for good consideration as between themselves that production anywhere on the pooled lands would constitute production from each parcel, and thus would fulfill the condition that would keep alive term mineral grants that would have otherwise expired for want of production from such lands.

The able trial Judge clearly distinguishes this case from the Spradley and Southland cases, in these words:

> "But the Southland and Spradley cases are bottomed upon the mutual AGREEMENT of the reversioners and the owners of the term mineral interests. In those cases and the ones upon which they are based (footnote 6, supra) all the parties to the joint or contemporaneous leases SURRENDERED something and RECEIVED something. They surrendered their right to claim ALL royalties from their particular land; and they received a right to share proportionately in the lands of the other parties to the leases. There was consideration. There was AGREEMENT.
>
> "Here the Parmelee-Etchison group did agree WITH UNION that shut-in gas well rentals would keep the LEASE alive. They did NOT AGREE with the owners of the term mineral interests, or with anyone else, that the shut-in gas well payments would prolong or extend the term MINERAL GRANTS. The ex parte ratifications by the owners of the term mineral interests, more than a year later, could not and did not create an

> agreement by the Parmelee-Etchison group to extend the term mineral grants, or that 'shut-in' payments would constitute 'paying production' WITHIN THE MEANING OF THE MINERAL GRANTS. The Parmelee-Etchison group has done nothing at any time to indicate a relinquishment of their right to claim a reversion in the event of 'no paying production on said land' upon the termination date. As the Court said in Sellers v. Breidenbach, supra: 'The parties could have placed in their royalty deed a shut-in gas well provision, if they had desired to do so, but we find no such provision in this deed.' " (R. pp. 225-226).

The Court of Appeals approved and adopted the opinion of the District Court, affirming the judgment for the reasons stated by the trial Court.

The Appellate Courts of Texas have found no conflict between the pooling cases and the rule announced in the instant case. In the *Archer County* case, 326 SW 2d, 250, a similar question was before the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas. In that case the Court clearly distinguishes the Spradley and Southland cases and follows the rule announced in *Sellers v. Breidenbach*, 300 SW 2d, 178 (1957), Writ Refused. The El Paso Court of Civil Appeals cited with approval the holdings of the District Court and the Court of Appeals in this case. The Supreme Court of Texas, in both the Spradley and Southland cases, explicitly bases its decisions upon contracts and agreements, modifying the term limitation clause in the mineral deeds, subsequently entered into and executed by the parties to the mineral deeds.

In the case of *Sellers v. Breidenbach*, 300 SW 2d, 178 (1957), Writ Refused, the Court of Civil Appeals

for the Fourth Supreme Judicial District of Texas, construed the terms of a clause in a term royalty deed, which is identical with the terms of the clause before this Court for construction. In the Sellers case, on the terminal date of the deed "there were two completed shut-in gas wells capable of producing gas, but absolutely not producing". The Court stated:

> "The parties could have placed in their royalty deed a shut-in gas well provision, if they had desired to do so, but we find no such provision in this deed. They could have provided that the royalty deed would be continued in effect if a well capable of producing was completed on the premises, if they had so desired, but they did not do so. 'Paying Production' does not mean the completion of a well capable of producing, it means a well which is actually producing on the significant date."

The action of the Supreme Court of Texas on application for writ of error filed in the Sellers case was "Refused" rather than "Refused. No Reversible Error". By such action of the Supreme Court of Texas, the opinion of the Court of Civil Appeals is given the same precedential value as one of the Supreme Court's own opinions and, by unanimous agreement, the Justices of the Supreme Court have declared that such opinion "in all respects has correctly declared the law". Hon. Robert W. Calvert, Associate Justice, Supreme Court of Texas in his commentary "*The Application for Writ of Error*", a discussion of Rule 469, Texas Rules of Civil Procedure; *Vernon's Annotated Texas Rules of Civil Procedure, Vol.* 3, *page* 404; also *Rule* 483, *Vernon's Annotated Texas Rules of Civil Procedure, Vol.* 3, *page* 440. (Appendix A & Appendix B)

Opposing counsel have undertaken (Petition 3, line 28, and note 1) to brush aside this clear-cut holding by referring to it as a "dictum in a case decided by an intermediate appellate court of this state which is readily distinguishable," —. Counsel failed to show in their petition that this case was taken before the Supreme Court of Texas on petition for writ of error, which court placed its stamp of approval thereon by refusing to grant the writ. The alleged ground for distinguishing the case is set out in an affidavit filed by one of the opposing counsel (R. 135-136) who claims to have examined the briefs filed in the *Sellers* case and to have found that the lease there involved did not contain a shut-in well clause. No more complete answer can be given to this effort to distinguish the *Sellers* case than that by the able District Judge, who said (R. 221):

> "Counsel seek to distinguish the Sellers-Breidenbach case by an affidavit that they have searched the records and that the LEASE there did not contain, as here, a shut-in gas well provision. But, as disclosed by the emphasized portions of the foregoing quotation from the opinion, it is the MINERAL DEED, NOT THE LEASE, that should have contained a provision securing to the term mineral owners the benefit of a shut-in gas well provision."
> (Emphasis by the Court).

In *Holchak v. Clark*, 284 SW 2d, 399 (1955), Writ Refused, the Court construed a term limitation clause in a mineral deed of practically the exact wording as the clause in the instant case. The rule of construction applied in this Holchak case is the same rule applied in

the Archer County case and the Sellers case, and followed by the Court of Appeals in the instant case.

The Court states the rule to be:

> "Had the parties desired a provision which would allow the term of the deed to be extended by a discovery of oil within the definite term, followed by diligent operations thereafter, they could have expressly so provided. As said by the United States District Court for the Eastern District of Oklahoma in Wickham v. Skelly Oil Co., 106 F. Supp. 61, 69, affirmed Skelly Oil Co. vs. Wickham, 10 Cir., 202 F. 2d 442: 'No court will rewrite or reform a contract for the parties in the absence of fraud or mutual mistake, therefore, this court will not rewrite the lease contract for the parties and in effect substitute a reformed contract for them to include something which is not present in the lease as made. To do so would be to construe a simple "well completion clause" to have the meaning of a "continuous drilling clause" or a "continuous development or operation clause".' Continuous operation clauses are usual in oil, gas and mineral leases and royalty conveyances. Rogers v. Osborn, 152 Tex. 540, 261 SW 2d, 311. It is not necessary that courts supply them."

This opinion was written by Judge Norvel, now Associate Justice of the Supreme Court of Texas. On application for writ of error, the Supreme Court of Texas gave this opinion the same stamp of approval which it later gave the Sellers case.

POSSIBLE CONFLICT IN FUTURO

Petitioners are in essence speculating upon the chance that the Supreme Court of Texas, in disposing

of the petition for writ of error in the Archer County case, may make some declaration of law that will in some manner support their view of Texas law in this case. Petitioners advance their forecast of the action to be taken by the Supreme Court of Texas on the application for writ of error filed in the Archer County case as a reason for granting certiorari herein and remanding. Respondents insist that the approval of the Supreme Court of Texas of the principles of law announced in the Sellers and Holchak cases clearly indicates the action which will be taken on the application for writ of error filed in the Archer County case. It cannot be reasonably anticipated that the Supreme Court of Texas will change the rule approved by it in these cases. It is not the function of a writ of certiorari to delay disposition of a pending suit merely because the unsuccessful litigant hopes that State law may be changed in his favor by a later State decision. The application for writ of error in the Archer County case was filed in the Supreme Court of Texas on August 17, 1959 and it cannot be reasonably anticipated that action thereon may be "expected momentarily". In the Court of Appeals Petitioners sought a rehearing upon this same ground, while the Archer County Case was pending before the Texas Court of Civil Appeals, vigorously asserting that a decision favorable to their contentions would be forthcoming if only judgment herein were delayed. An amicus curiae brief was filed by one of the counsel in the Archer County Case in support of Petitioners' position. Said petition for rehearing in the Court of Appeals was disallowed.

EVEN THOUGH SUCH SHUT-IN GAS WELL CLAUSE BE CONSIDERED A MODIFICATION OF THE TERM MINERAL DEEDS OF 1935, THE OPTION THEREIN GRANTED UNION PRODUCING COMPANY, LESSEE, WAS NOT EXERCISED UNTIL APPROXIMATELY THREE MONTHS AFTER THE REVERSION OF THE MINERALS GRANTED THEREBY.

Having held that the shut-in gas well clause of the lease did not enlarge the term limitation of the prior deeds, both the District Court and the Court of Appeals found it unnecessary to rule on the timeliness of the shut-in gas well tender. The well was completed and shut-in prior to October 25, 1955, the significant date in the deeds. On October 25, 1955 there was no paying production from the lands, and the grants terminated. In January, 1956, lessee tendered the shut-in gas well payments.

In the leading case of *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 171 SW 2d, 339 (1943), the Supreme Court of Texas laid down the rule that where the period allowed for making a shut-in well payment to keep alive a mineral estate "straddles" the date for expiration of the term, such payment must be made before such expiration date and while the term is yet alive, otherwise it comes too late and the estate lapses on the date fixed. This holding was stated and reaffirmed by the Supreme Court of Texas in a later leading case, *Rogers v. Osborn*, 152 Tex. 540, 261 SW 2d, 311 (1953). Texas law holds that if substitute production is to keep a limited term estate alive, then it must be operative on the reversion date. It cannot be

brought into effect after the estate has already lapsed. In other words, substitute production does not operate retroactively, so as to revive an estate already lapsed.

It thus appears that this case falls squarely within the factual situation dealt with in *Freeman v. Magnolia Petroleum Co.*, supra. The well was shut-in on October 23, 1955; Petitioners' limited term estates were set to lapse on October 25, 1955; the shut-in well payment relied upon as substitute production to keep Petitioners' limited term estates alive beyond October 25, 1955, was not tendered until after January 17, 1956. It follows that even if the shut-in well clause of the lease of 1954 to Union Producing Company should be deemed a part of Petitioners' limited term grants, and even if it can be said that the shut-in well payment was properly tendered within the quarterly period allowed therefor, nevertheless it came too late to serve as substitute production to keep Petitioners' estates alive, for the term grants had already reverted on October 25, 1955. This is the established law of Texas as laid down by its Supreme Court in the *Freeman* case and reaffirmed in the *Rogers* case. For substitute production to be effective under this clause to keep Petitioners' limited term grants alive, the shut-in well payment must have been made before October 25, 1955.

The learned District Judge did not pass on this point in his decision of the instant case, for the obvious reason that it was not necessary to do so. His holding that the shut-in well clause of the lease was not to be read into Petitioners' limited term grants, was decisive of the case, and rendered it altogether unnecessary to go

further and deal with this additional point. Nonetheless, it is equally decisive of the case. Obviously, the granting of the petition for certiorari filed herein would be pointless, since the *Freeman* and *Rogers* cases, supra, are controlling on this decisive principle of Texas law.

This is an ordinary suit between citizens of the State of Texas brought to determine title to mineral interests in lands situated in Texas. Federal jurisdiction is conferred only by reason of diversity on the part of the disinterested party plaintiff interpleader. No Federal law, statute, or decision is remotely involved. Unlike the abstention cases cited by Petitioners, no constitutional question is presented, no issue of comity, disruption of State administrative process, collection of State taxes, exercise of eminent domain by a State agency, or any other principle of law of public importance is involved. Petitioners suggest no question whose resolution by this Court will have any importance beyond the parties here involved. A local rule of construction of a clause in an oil and gas lease is presented. The local rules of construction of oil and gas leases, royalty and mineral deeds, and other instruments creating rights and titles in mineral estates, are peculiar to the State of Texas. There is little unanimity among the oil-producing States in the rules of construction of such instruments. In both the District Court and the Court of Appeals, able Judges, well versed in the principles of law here involved, have determined the issue. The applicable law of Texas, as announced by Texas Courts, has been cited and followed.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the above and foregoing Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon all counsel for Petitioners and Mr. W. S. Stovall, by placing copies of same properly addressed and stamped in the United States mail on this, the ..... day of September, A.D. 1959.

JAMES C. ABBOTT

APPENDIX "A"

EXCERPT FROM THE "APPLICATION FOR WRIT OF ERROR" BY HONORABLE ROBERT W. CALVERT, ASSOCIATE JUSTICE, SUPREME COURT OF TEXAS.

"If no more than two of the Justices believe the judgment of the Court of Civil Appeals is erroneous, the writ will be denied and the conference then determines whether the application will be stamped 'Refused' or 'Refused. No Reversible Error'.

"The notation 'Refused. No Reversible Error' is applied automatically if the opinion of the Court of Civil Appeals has dealt with questions which are not within the jurisdiction of the Supreme Court or which are not brought forward by Points of Error for review by the Supreme Court (Shambry v. Housing Authority, 1953, 152 T. 122, 255 S. W. 2d 184); or if the Justices are not unanimous in the view that the judgment of the Court of Civil Appeals is a correct one; or if the opinion of the Court of Civil Appeals has dealt with questions of law not necessary to a decision of the case. If none of these situations exists, the opinion of the Court of Civil Appeals is carefully considered and frequently read aloud to see if the Justices can reach a unanimous agreement that it 'in all respects has correctly declared the law' before it is given the same precedential value as one of the Supreme Court's own opinions by stamping it 'Refused'. If unanimity cannot be achieved it is stamped 'Refused. No Reversible Error'. See 12 Texas Bar Journal 547, Notations on Applications for Writs of Error, by Gordon

Simpson, former Associate Justice of the Supreme Court."

Vernon's Annotated Texas Rules of Civil Procedure, Vol. 3 *at page* 411.

APPENDIX "B"

TEXAS RULES OF CIVIL PROCEDURE:

"RULE 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'

"In cases of conflict named in subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended, the Supreme Court shall grant the application for writ of error, unless it be in agreement with the decision of the Court of Civil Appeals in the case wherein the application is filed, in which event said Supreme Court shall so state in its order, with such explanatory remarks as may be deemed appropriate. In cases where the decision of the Court of Civil Appeals is in conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse the same on the application for writ